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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-5208

EDWARD MARTIN McKENNA,
Petitioner,

vs.

NORTH CAROLINA,
Respondent.

* *

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

* *

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NO. _____

EDWARD MARTIN McKENNA,
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PETITION FOR A WRIT OF CERTIORARI

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The Petitioner, Edward Martin McKenna, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina, filed in this case of Edward Martin McKenna v. State of North Carolina, No. 22 - Wake, May 14, 1976.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 N.C. 668, and 224 S.E.2d 537 (1976). A copy of this opinion is appended to this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was filed in this cause on May 14, 1976, and issued on _____, 1976. The jurisdiction of this Court is involved under 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Did the Trial Court err in permitting the State to introduce evidence which was seized by an agent of the State Bureau of Investigation without a warrant and later seized by other federal and state agents acting pursuant to a valid warrant?

2. Did the Trial Court err in denying the Petitioner's motion to dismiss the charge where the Petitioner was never properly charged with the crime thereby denying him due process of law?

3. Should the Petitioner's death penalty be now automatically reduced to life imprisonment?

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. amend. IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but on probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. U.S. Const. amend. XIV, 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. U.S. Const. amend. VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

4. U.S. Const. amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The Defendant appellant was charged in a Bill of Indictment with the murder of William Blaney Holland, Jr., on November

10, 1973 (R p 10). The case came on for trial before the Honorable Giles R. Clark, Judge Presiding, and a jury at the first July, 1975 Criminal Court Session of Wake County Superior Court. Prior to the arraignment and plea of the defendant, motions were made by the defendant to dismiss the charges against him and to suppress evidence to be presented by the State (R pp 14 and 16). The Motion to Dismiss was denied after a voir dire hearing (R p 38) and during the trial a voir dire hearing was held on the Motion to Suppress, said motion being denied. (R pp 82 and 104).

Evidence for the State tended to show that William Blaney Holland, Jr., returned to his home in the early morning hours of November 10, 1973. Two persons had broken into the home and were in the process of burglarizing same. Mr. Holland confronted the two burglars and a gunfight ensued. During the gunfight, Mr. Holland was shot in the head and died as a result of the gunshot wound.

After an investigation of the crime scene, it was discovered that a Colt .38 revolver belonging to Mr. Holland was missing. In march, 1974, Agent Wesley Terry was investigating the defendant appellant for other crimes unrelated to this appeal. During his investigation and pursuant to an illegal search and seizure, Agent Terry obtained from the McKenna residence the Colt .38 revolver which was missing from the Holland burglary. The defendant appellant was arrested on federal and state charges and after the aforementioned revolver was traced, he was indicted as described above. (R p 10). The state offered evidence of the co-defendant Charles Pittman, supposedly the other man in the house the night of the murder, who implicated the defendant appellant as being the perpetrator of the crime. (R pp 64-66).

The Defendant appellant's evidence tended to show that he did not commit the crime charged but at the time of the murder, he was at a dance in Chadbourn, North Carolina.

A verdict of guilty of murder in the first degree was returned by the jury on July 11, 1975. The defendant appellant was sentenced to death.

Petitioner entered appropriate exceptions and appealed to the Supreme Court of North Carolina, assigning as error the denial of his motion to suppress (R.pp. 82 and 104), and the denial of his motion to dismiss (R. p. 38).

By opinion dated May 14, 1976, the North Carolina Supreme Court found no error and affirmed Petitioner's conviction. (Appendix)

REASONS FOR GRANTING THE WRIT

1. THE SEARCH QUESTION. REVIEW OF THE QUESTION OF THE LEGALITY OF THE SEARCH IS IMPORTANT BECAUSE THE PRESENT FACT SITUATION PRESENTS AN AREA OF ABUSE OF THE RIGHT TO BE FREE OF UNREASONABLE SEARCHES.

Defendant appellant argues that the photographs added little, if any, in the way of probative value and tended solely to inflame the jury and thus should have been excluded by the trial court.

On March 26, 1975, Wesley Terry, a special agent with the State Bureau of Investigation, entered the petitioner's home while the defendant was not present, without his consent, went to the defendant's bedroom and searched in the top dresser drawer next to the bed, there finding a .38 caliber pistol. He recorded the serial number of the pistol (R p 72). Agent Terry remained in the house until other state and federal agents arrived with search warrants and with the defendant who had at that time been placed under arrest (R p 74).

Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. Camera v. Municipal Court of San Francisco, 387 US 523 (1967). The existence of such an exceptional situation to authorize officers to

search a dwelling without a warrant is not disclosed where (1) there is no suggestion that anyone consented to the search; (2) the officers were neither responding an emergency nor in hot pursuit of a fleeing felon; (3) the goods ultimately seized were neither in the process of destruction or about to be removed from the jurisdiction; and (4) the officers were able to procure warrants for the accused's arrest. Vale v. Louisiana, 399 US 30 (1969).

The circumstances of the search by Agent Terry of defendant McKenna's home were not such as to justify a search without a warrant and the search was therefore, unreasonable under the Fourth and Fourteenth Amendments. Evidence that is obtained by an illegal search or seizure. Weeks v. United States, 232 US 383 (1914).

The purpose of the Fourth Amendment is to guarantee that every person shall be free from unreasonable searches and seizures. The exclusionary rule is calculated to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it. Elkins v. United States, 364 US 206 (1960).

Unlike tangible evidence such as drugs or stolen property, intangible evidence such as serial numbers on firearms can be seized more than once while the firearm itself remains in the same location. Petitioner McKenna contends that unless courts exclude evidence seized in a subsequent legal search which has previously been seized in an illegal search, the purpose of the Fourth Amendment and the exclusionary rule will be contravened.

2. THE QUESTION OF THE CHARGE. REVIEW OF THIS QUESTION IS IMPERATIVE TO DETERMINE THE SUFFICIENCY OF THE STATE'S PRACTICE OF INFORMING THE PETITIONER OF THE CHARGES AGAINST HIM.

Petitioner was first taken into custody by Federal officers on or about the 26th day of March, 1975 (R p 15). He remained in custody of either federal or state officials from that time until the time of his trial for murder in state court. A complaint for arrest and a warrant for first-degree murder was filed against defendant, sworn to and issued on the 20th day of April, 1975 (R pp 9, 10), but such warrant was never served on defendant (R p 30). A true bill was returned on an indictment charging defendant with murder and a capias was issued on the 28th day of April, 1975 (R pp 10, 11). Defendant was never served with a copy of the indictment. Defendant was finally served with the capias instanter on the 15th of May, 1975. The capias stated that Defendant had been indicted by the grand jury for murder and no more (R p 27). Counsel for defendant was permitted to withdraw on the 30th of May, 1975 and not until that time did defendant acquire effective representation in this matter with the appointment of the present counsel (R p 1). The trial of defendant began on the 7th of July, 1975. Thus, even though defendant was continuously in custody, he was not furnished with a warrant or other proper criminal process advising him of the particulars of the crime charged until shortly before the trial.

The Sixth Amendment to the Constitution of the United States guarantees that "the accused shall enjoy the right...to be informed of the nature and cause of the accusation." The right guaranteed by the Constitution of the United States would seem to require that the offense be charged with clearness and all necessary certainty. This requirement does not seem to be met by a mere capias reciting only that defendant is charged with murder.

Defendant contends that the capias was insufficient notice of so serious a charge and that the delay in being properly and fully informed greatly prejudiced him in his preparation

and defense against such a charge. Defendant was not properly charged with the crime in that he was not fully adequately informe and thus important constitutional rights were infringed upon.

3. THE PUNISHMENT QUESTION. THIS QUESTION IS IMPORTANT IN THAT THE STATUS OF THOSE PRISONERS NOW FACING DEATH SENTENCES SHOULD NOT BE FINALLY SETTLED.

North Carolina Session Laws 1973, C. 1201, s. 7, effective April 8, 1974, provides "In the event it is determined .... that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment." For a crime committed before this time, however, there was no similar provision. The North Carolina Supreme Court is now in the position of determining what is to be done with those who had received the death sentence under the law found unconstitutional in Woodson v. North Carolina ___ U.S. ___, decided on July 2, of this year. The Court does not have adequate guidelines within which to make these determinations, as there is no provision for the reduction of the sentences for those whose crimes took place before April 8, 1974.

CONCLUSION

For these reasons, a Writ of Certorari should issue to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully submitted,

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October Term, 1976

EDWARD MARTIN McKENNA,

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v.

STATE OF NORTH CAROLINA,

Respondent.

Brief for Resp. in opposition

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

****

****

BRIEF OF RESPONDENT NORTH CAROLINA

IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

****

OPINION BELOW

In State v. McKenna, filed May 14, 1976, and reported at 289 N.C. 668, the Supreme Court of North Carolina reviewed the judgment of the Wake County Superior Court, North Carolina, July 7, 1975, and found that defendant had a trial free from error and affirmed the decision of the Trial Court in all respects.

From the judgment below, petitioner has filed a Petition for Writ of Certiorari to the Supreme Court of North Carolina and the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO INTRODUCE THE ALLEGED MURDER WEAPON?

II. DID THE TRIAL COURT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE CHARGE BECAUSE OF FAILURE TO SERVE THE WARRANT FOR ARREST AND THE INDICTMENT ON DEFENDANT?

III. SHOULD THIS COURT DETERMINE THE PROPER SENTENCE TO BE IMPOSED ON PETITIONER?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted by a true bill returned April 28, 1975, and was arrested pursuant to a valid warrant issued April 20, 1975, for the first degree murder of William Blaney Holland, Jr., on November 10, 1973, in Wake County, North Carolina. Defendant was tried before the Honorable Giles R. Clark, Judge Presiding, and a jury at the first July, 1975 Criminal Court Session of Wake County Superior Court. Defendant was found guilty of first degree mureer and was sentenced to death by a judgment dated July 7, 1975.

On voir dire testimony, Kenneth D. Brady, a treasury agent with the Bureau of Alcohol, Tobacco and Firearms, testified that he went to the defendant's home on March 26, 1975, accompanied by defendant who was then in custody on a charge of violation of the United States Gun Control Act in 1968.

Agent Brady had both an arrest warrant and a search warrant authorizing a search of defendant's premises. He was accompanied by State Bureau of Investigation Agent Marshal Evans who had a State search warrant. Both search warrants were read to defendant when the Agents arrived at his home. The officers searched defendant's home for firearms and seized all firearms and ammunition found on the premises, including State's Exhibit 23. At some prior occasion, SBI Agent Wesley Terry had entered defendant's home without a search warrant. At that time, he apparently saw the weapon in question in defendant's house. SBI Agent Marshal Evans also testified on voir dire that he searched defendant's home with Agent Brady and that he had a valid search warrant which he read to defendant upon entering defendant's home. The Trial Court found on the basis of testimony presented at voir dire that the search warrants were not based on information obtained by Officer Terry upon his prior entry into defendant's home, that both warrants were issued before Officer Terry entered defendant's premises, and that the weapon was lawfully seized by Agent Brady and was not the fruit of any official illegality. The Supreme Court of North Carolina affirmed the findings of the Trial Court as being based on competent evidence and held that they were conclusive upon appeal. Therefore, the admission into evidence of the weapon was proper and did not violate defendant's rights.

In all other respects, the evidence is substantially as set out in defendant's Petition for Writ of Certiorari to the Supreme Court of North Carolina.

ARGUMENTS

I. THE TRIAL COURT PROPERLY PERMITTED THE STATE TO INTRODUCE THE ALLEGED MURDER WEAPON, WHICH WAS SEIZED IN A SEARCH PURSUANT TO VALID SEARCH WARRANTS.

Defendant contends that the entry of Agent Wesley P. Terry, an investigator with the Bladen County, North Carolina, Sheriff's Department, into defendant's home, and the discovery of the weapon in question by Agent Terry, prevented the State from introducing the weapon into evidence. Admittedly, Agent Terry did not have the right to search defendant's home. However, the weapon was obtained by Agent Kenneth Brady, with the Bureau of Alcohol, Tobacco and Firearms, and Agent Marshal Evans of the North Carolina State Bureau of Investigation, who both had proper search warrants. The Trial Court found that Agents Brady and Evans had probable cause to believe that defendant's premises contained firearms in violation of both federal and State laws, but the search warrants were not based on information obtained by Officer Terry during his prior entrance onto defendant's premises, but were both issued before Officer Terry entered defendant's premises. The Trial Court concluded that the weapon was lawfully seized by Agent Brady and that it was not the fruit of any official illegality.

> "The trial judge made findings of fact substantially in accord with the voir dire testimony of the State's witnesses and, based on those findings, concluded as a matter of law that Agents Brady and Evans had probable cause to believe that defendant's home contained firearms in violation of federal and state laws and thus subject to seizure under a lawful search warrant. The court further concluded that the search warrants obtained by Agents Brady and Evans were not based upon information secured by Agent Terry when he entered defendant's premises on 26 March 1975, both warrants having been issued prior to such entry. The trial court concluded that the weapon identified as State's Exhibit 23 was lawfully seized by Agent Brady and was not the fruit of any official illegality. The motion to suppress was therefore denied and State's Exhibit 23 was received in evidence over defendant's objection. . . .

> "In the instant case, the findings of the trial judge that the search warrants under which Agents Brady and Evans acted were issued prior to Agent Terry's entry and were not based upon any information obtained by Agent Terry are fully supported by competent evidence presented on voir dire. These findings, therefore, are conclusive on appeal and this Court cannot properly set aside or modify them. See State v. Curry, 288 N.C. 660, 220 S.E.2d 545 (1975); State v. Thomas, 284 N.C. 212, 200 S.E.2d 3 (1973); State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Pike, 273 N.C. 102, 159 S.E.2d 334 (1968); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966), cert. den'd. 386 U.S. 911, 17 L.Ed. 2d. 784, 87 S.Ct. 860 (1967). Accordingly, the admission into evidence of State's Exhibit 23 was proper and not violative of defendant's Fourth Amendment rights. This assignment is overruled." State v. McKenna, 289 N.C. 668 (1976).

It is clear that the weapon was not seized in or as a result of an illegal search. Defendant, however, contends that "unless courts exclude evidence seized in a subsequent legal search which has previously been seized in an illegal search, the purpose of the Fourth Amendment and the exclusionary rule will be contravened." (Petition for Writof Certiorari of Petitioner McKenna, p. 5).

Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. . . . This prohibition applies as well to the fruits of the illegally seized evidence." (citations omitted) United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974). Here we do not have evidence obtained in an illegal search or seizure, nor is this evidence derivatively obtained as a result of an illegal search or seizure. The purpose of the exclusionary rule has in no way been violated by use of the weapon in question as evidence in the instant case. "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates the Fourth Amendment rights." Stone v. Powell, 96 S.Ct. 3037 (1976). The purposes of a rule aimed primarily at deterring unlawful police conduct are not frustrated by permitting admission

into evidence of a weapon which was not seized as a result of unlawful police conduct even indirectly.

This Court has held that illegal actions of officers beyond their authority would not render inadmissible evidence which was properly seized even in the same transaction. United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); McGuire v. United States, 273 U.S.95, 47 S.Ct. 269, 71 L.Ed. 566 (1927). This Court has also observed that "facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively." United States v. Nardone, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

The weapon in this case did not become sacred simply because one officer improperly searched defendant's residence and noted the number of the gun. Agents Brady and Evans were properly in the house and searched the premises and seized the weapon pursuant to a valid search warrant. Their actions were in no way the results of independent, improper actions by Agent Terry or any other person. Application of the exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served." Stone v. Powell, 96 S.Ct. 3037 (1976); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974). Since application of the exclusionary rule to the circumstances of this case would in no way further the purposes of the rule, it should not be extended to the instant case.

II. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE CHARGE BECAUSE OF THE FAILURE TO SERVE THE WARRANT FOR ARREST AND THE INDICTMENT ON DEFENDANT.

Defendant argues that his Sixth Amendment rights had been violated by failure to serve a copy of the warrant and indictment on him. The Sixth Amendment to the United States Constitution provides that "The accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." The Constitution does indeed guarantee a defendant the right to be informed of the nature of the charges against him. However, it does not gurantee that any particular method or means must be used for conveying this information to defendant. The requirement is that defendant have the right to be informed of the charges, and where defendant is adequately informed in ample time to prepare for his defense, failure to serve the indictment upon defendant should not invalidate the judgment in any way.

> "The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction of acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876); accord, Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962).

Regardless of whether a copy of the indictment was officially served upon defendant, he did have a copy of it well in time to prepare for trial. Defendant's own affidavit establishes that "he was not informed of the Grand Jury proceedings nor given a copy of the murder indictment against

him until over a week after the Grand Jury sat. Moreover, a capias instanter was served on defendant on 15 May 1975 informing him that he was under indictment for murder. Defendant was advised of the details of the charge by the officer who served the capias and also by his attorneys. He was arraigned and placed on trial on 7 July 1975. The record shows he had counsel at all times after 7 May 1975 and that no motion was ever made for a bill of particulars or for additional time in which to prepare his defense. These facts strongly suggest that defendant was sufficiently apprised of the charges against him and had adequate time to prepare his defense.

> "The usual practice, and the better practice in our view, is to serve defendant promptly with the arrest warrant. This would have informed him of the charges against him. Such service, however, is not a constitutional requirement of due process. Due process is satisfied if the defendant is adequately notified of the charge against him, is permitted to confront his accusers and witnesses with other testimony, has assistance of counsel, and is afforded adequate time to prepare and present his defense . . . . The record in this case indicates that defendant was afforded all the safeguards. No prejudice has been shown by failure to serve the warrant. If defendant needed additional information concerning the charge against him, a bill of particulars, as authorized by former G.S. 15-143 (now G.S. 15A-925), would have provided it." State v. McKenna, 289 N.C. 668 (1976).

Defendant's own affidavit indicates that he actually had a copy of the indictment even though it was not officially served upon him. He was served with a capias instanter informing him that he was under indictment for murder nearly two months before his trial. He was represented by an attorney. He could have requested a copy of the indictment or checked it in the records. He might have requested additional time for preparation of his defense. He did none of these things. The Trial Judge found after a voir dire hearing that defendant had shown no prejudicial denial of his constitutional rights. The Supreme Court of North Carolina agreed that apparently he felt that he could adequately prepare his defense. He was in no way denied his constitutional right to be informed of the charges against him.

III. THIS CASE SHOULD BE REMANDED TO THE NORTH CAROLINA SUPREME COURT FOR VACATING OF THE DEATH PENALTY AND PROPER SENTENCING.

Defendant appears to argue that this Court should determine defendant's proper sentence after the death penalty is vacated or provide standards for the North Carolina Courts to use in re-sentencing defendant. Once the invalidity of the death sentence is recognized, however, sentencing is properly a matter of the courts in the State in which defendant was tried and convicted.

> "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radvinowicz, The History of English Criminal Law: The Movement for Reform, 1750-1833, Rassim, these are perculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, C. 23, §4(3); 16 & 17 Geo. V, C. 15, §2(4). This Court has no such power." Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405, reh. denied 358 U.S. 858, 79 S.Ct. 13, 3 L.Ed. 2d 92 (1958).

The Supreme Court of North Carolina has already dealt with cases presenting this same question. In State v. Davis, 290 N.C. 511 (1976), the Supreme Court of North Carolina ruled that the punishment for persons sentenced to death under the reasoning of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), must be life imprisonment. The Court there vacated the death sentence and remanded to Superior Court of the appropriate county for directions to enter a judgment of life imprisonment. The Courts have followed this procedure in subsequent cases of this type coming before it. There is no need for the Supreme Court of the United States to intervene into this State-law matter. This Court should leave the Supreme Court of North Carolina and the Superior Court of

Wake County, North Carolina, where defendant was originally tried and convicted, free to determine the correct sentence for defendant in accordance with North Carolina law with due regard to the decision of this Court in Woodson v. North Carolina, 96 S.Ct. 2978 (1976).

CONCLUSION

Defendant had a trial free from error, and the Supreme Court of North Carolina correctly reviewed and affirmed the conviction. The Supreme Court of North Carolina is taking proper steps to vacate the death penalty and insure that a proper sentence is determined in all those cases for which the defendants were given the death sentence in violation of their constitutional rights.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 5th day of October, 1976.

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